U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11972135

Date: OCT. 3, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, an information technology company, seeks to employ the Beneficiary as a technical architect. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center revoked the approval of the petition, concluding that the job offered to the Beneficiary does not qualify for advanced degree professional classification.

The Petitioner bears the burden of establishing eligibility for the requested immigration benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

A. Employment-Based Immigration

Immigration as an advanced degree professional usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to establish that there are not sufficient U.S. workers who are available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant classification, and that the employer has the ability to pay the proffered wage. *See* 8 C.F.R. § 204.5. These requirements must be satisfied by the priority date of the immigrant visa petition. *See* 8 C.F.R. § 204.5(g)(2), *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d). In this case, the priority date is November 27, 2015.

USCIS may revoke its prior approval of an immigrant visa petition "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. Revocations under 8 C.F.R. § 205.2 may be made only after issuing a notice of intent to revoke (NOIR) to the petitioner which provides the opportunity to submit evidence in support of the petition and in opposition to the alleged grounds for revocation. If the petition approval is revoked, the director must provide the petitioner with a written decision that explains the specific reasons for the revocation. *Id.*

A NOIR is issued for "good and sufficient cause" if the record of proceeding at the time of issuance would warrant the denial of the petition. *See Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, the approval of the petition is properly revoked if the record (including any NOIR response submitted by the petitioner) warrants the denial of the petition. *See id.* at 452; s*ee also Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (the realization that a petition was approved in error is good and sufficient cause for revoking its approval).

Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

B. Advanced Degree Professional Classification

For employment-based immigrant visa petitions requesting advanced degree professional classification, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i). An "advanced degree" is defined as an academic or professional degree above a bachelor's degree; or a bachelor's degree followed by at least five years of progressive experience. 8 C.F.R. § 204.5(k)(2). Therefore, for classification as an advanced degree professional, the accompanying labor certification must require an academic or professional degree above a baccalaureate, or a baccalaureate degree followed by at least five years of progressive experience.

II. REVOCATION OF IMMIGRANT VISA PETITION APPROVAL

In determining whether the offered position qualifies for advanced degree professional classification, we look to the terms of the labor certification. The minimum education, training, experience, and other requirements for the offered position are set forth at section H:

H.4. Education: Master's degree in computer science, engineering (any), information systems, business administration or related field.
H.6. Experience in the job offered: 12 months.
H.8. Alternate combination of education and experience: "Bachelor's plus 5 years of progressive experience."
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 12 months as a software developer, senior associate, associate, programmer, or "senior sof".[1]

[1] The full name of the "senior sof" occupation appears to have been cut off by character limits for the form.

H.14. Specific skills or other requirements:

> The one year of IT experience must include experience using Agile, Perl and Microstrategy. In lieu of the above education and experience requirements, we will accept a Bachelor's degree (or foreign equivalent) in Computer Science, Engineering (any), Information Systems, Business Administration, or related field, plus five years of progressive experience in the IT field. One year of the five years of progressive IT experience must include experience using Agile, Perl and Microstrategy. We will accept any suitable combination of education, training or experience in lieu of the above stated education and experience requirements.

The Director approved the immigrant visa petition and subsequently issued a NOIR informing the Petitioner that the petition was approved in error. The NOIR stated that the job offer portion of the accompanying labor certification did not require at least a master's degree or a bachelor's and five years of progressive experience and therefore the petition could not be approved in the requested advanced degree professional classification. After receiving the Petitioner's NOIR response, the Director revoked the approval of the petition, concluding that the language at section H.14 stating that "We will accept any suitable combination of education, training, or experience in lieu of the above stated education and experience requirements" indicates that the Petitioner was willing to accept something less than a master's degree or a bachelor's degree followed by five years of progressive experience.

The sentence at issue in this case involves language required by Department of Labor regulations to be added to labor certifications in certain circumstances. The regulation at 20 C.F.R. § 656.17(h)(4)(ii) states:

> If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

This regulation was intended to incorporate the Board of Alien Labor Certification Appeals (BALCA) ruling in *Francis Kellogg*, 1994-INA-465 and 544, 1995-INA 68 (Feb. 2, 1998) (*en banc*). The statement on the labor certification that an employer will accept applicants with "any suitable combination of education, training or experience" is commonly referred to as "*Kellogg* language."[2]

[2] Two BALCA decisions have weakened the *Kellogg* language requirement. In *Federal Insurance Co.*, 2008-PER-00037 (Feb. 20, 2009), BALCA held that the ETA Form 9089 failed to provide a reasonable means for an employer to include the *Kellogg* language on the labor certification. Therefore, BALCA concluded that the denial of the labor certification for failure to write the *Kellogg* language on the labor certification application violated due process. Also, in *Matter of Agma Systems LLC*, 2009-PER-00132 (BALCA Aug. 6, 2009), BALCA held that the requirement to include *Kellogg* language did not apply when the alternative requirements were "substantially equivalent" to the primary requirements. *See also Matter of Intent Design, Ltd.*, 2016 WL 6561079 (confirming that, under *Federal Insurance*, due process precluded a literal application of this provision since there was no place on the labor certification where the *Kellogg* language could be placed).

As the Petitioner notes on appeal, given the history of the *Kellogg* language requirement, USCIS does not interpret this sentence to mean that the employer would accept lesser qualifications than the primary and alternative requirements stated on the labor certification. When a petitioner goes beyond the *Kellogg* language, however, we must evaluate the effect of that additional language.

When determining the minimum requirements for the offered position, we must examine "the language of the labor certification job requirements." *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS interprets the meaning of terms used to describe the requirements of the offered position by examining the labor certification "exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying the plain language" of the labor certification even if the employer may have intended different requirements than those stated on the form. *Id.* at 834. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d 1008 at 1012-1013; *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981); *Matter of Symbioun Techs., Inc.,* 2010-PER-10422 (BALCA Oct. 24, 2011) (finding that a "comprehensive reading of all of Section H" of the labor certification clarified an employer's minimum job requirements).

In this case, the Petitioner added the phrase "in lieu of the above stated education and experience requirements" to the standard *Kellogg* language. The Petitioner claims that this phrase is implicit in the *Kellogg* language and does not change its meaning. The Director concluded that this added phrase turns the sentence from regulatory-required language that does not change the minimum requirements of the offered position into a sentence that does change the minimum requirements.

Upon *de novo* review, we agree with the Director. The phrase "in lieu of the above stated education and experience requirements" does more than make explicit what the *Kellogg* language implies. The *Kellogg* language indicates a petitioner's equal acceptance of candidates meeting either the primary or the alternate requirements set forth on the labor certification. In stating in section H.14 that it would accept any suitable combination of education or experience "in lieu of" the otherwise defined primary and alternate education and experience requirements, the Petitioner no longer restricts acceptable combinations to those spelled out primary and alternate requirements in section H. Rather the labor certification states that a combination of education and experience that does not necessarily accord with the minimum requirements in H.4 to H.10 could also be acceptable. In short, the statement in box H.14 of the labor certification went beyond the *Kellogg* language and created a different minimum requirement that allows for a combination of education, experience, or both that could be less than a master's degree or a bachelor's degree followed by five years of progressive experience.

As discussed above, our interpretation of the stated job requirements must involve applying the plain language of the labor certification. *See Rosedale Linden Park Company*, 595 F. Supp. 829 at 834. Based on the plain language of section H of the labor certification, the minimum requirements of the offered position in this case can be satisfied with less than less than a master's degree or a bachelor's degree followed by five years of progressive experience. Accordingly, the labor certification does not support the requested advanced degree professional classification under section 203(b)(2) of the Act and 8 C.F.R. § 204.5(k)(4)(i). Therefore, we conclude that the Director had good and sufficient cause

to issue the NOIR and revoke the approval of the petition. *See Matter of Estime*, 19 I&N Dec. 450 at 451; *Matter of Ho*, 19 I&N Dec. 582 at 590.

III. CONCLUSION

The labor certification does not support the requested classification of advanced degree professional because it does not require at least an academic or professional degree above a baccalaureate, or a baccalaureate degree followed by at least five years of progressive experience in the specialty.

ORDER: The appeal is dismissed.